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Moen v. State Respondent's Brief Dckt. 40600

IN THE SUPREME COURT OF THE STATE OF IDAHO

JAMES MOEN, Petitioner-Appellant, vs. STATE OF IDAHO, Respondent.	No. 40600 Kootenai Co. Case No. CV-2011-3442

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

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STATEMENT OF THE CASE

Nature of the Case

James Neal Moen appeals from the denial of his petition for post-conviction relief.

Statement of the Facts and Course of the Proceedings

Moen pled guilty to felony driving under the influence and a habitual offender enhancement in exchange for dismissal or reduction of several other charges. State v. Moen, 2010 Unpublished Opinion No. 670, Docket 35907 (Idaho App., October 15, 2010). The district court imposed a sentence of eight years with three years fixed and retained jurisdiction. Id., pp. 1-2. Upon the recommendation of the Department of Correction, the district court relinquished jurisdiction about two months later because Moen "refused to follow rules and instructions." Id., p. 2. Moen filed a Rule 35 motion and request for counsel asserting, among other things, "that his mental health issues were not addressed or taken into consideration during sentencing." Id. After determining the motion was meritless, the district court denied both the motion and the request for counsel. Id. The Idaho Court of Appeals affirmed the district court's denial of the motion and request for counsel, concluding the Rule 35 motion "failed to assert a viable claim of an excessive sentence" and was therefore "frivolous," based on the following procedural history:

> At the sentencing hearing, Moen submitted a competency evaluation and a substance abuse assessment for the district court's consideration. The competency evaluation provided diagnoses of adjustment disorder with anxiety and personality disorder with antisocial and narcissistic features, and the

> assessment provided that Moen had indications of mental health problems. The competency evaluation also explained that Moen acts out antisocially and has difficulty coping with the legal system when he does not get his way. At the jurisdictional review hearing, the district court inquired whether Moen had the resources to obtain a psychological evaluation. After Moen's counsel stated that it was likely that an evaluation could be accomplished, the district court continued the hearing. At the continued hearing, Moen requested another continuance so that he could complete a psychological evaluation, which the district court granted. However, when the hearing was finally held, Moen proceeded despite the fact that no evaluation had been accomplished.

Id., pp. 2-3 (footnote omitted).

Moen filed a petition for post-conviction relief, asserting violations of his rights under the Sixth, Eighth, and Fourteenth Amendments by both the district court and his trial counsel, and ineffective assistance of both trial and appellate counsel. (R., pp. 7-13, 36-43, 52-66, 118-32.) His requested relief was a reduction of his sentence to a four-year fixed term. (R., p. 9.) The state answered (R., pp. 115-16) and moved to dismiss (Augmentation, pp. 112-13). The district court also provided notice of intent to dismiss. (Augmentation, pp. 126-29.) The district court thereafter dismissed. (R., p. 181.) Moen filed a timely notice of appeal. (R., pp. 183-87.)

ISSUES

Moen states the issues on appeal as:

1. Did the district court err in summarily dismissing Mr. Moen's claims because he presented issues of fact that entitled him to post-conviction relief?

2. Did the district court violate Mr. Moen's right to due process and abuse its discretion by denying him of [sic] a meaningful opportunity to present his post-conviction claims, [by] allowing counsel to withdraw and refusing to appoint replacement counsel?

3. Did the district court violate Mr. Moen's right to due process in dismissing several of his post-conviction claims *sua sponte* and without prior notice?

(Appellant's brief, p. 30.) The state rephrases the issues as:

1. The district court granted Moen two extensions to secure and present additional psychological evidence for sentencing, yet ultimately Moen did not present such evidence. Is Moen's claim that he did not have the opportunity to present favorable evidence frivolous?

2. Has Moen failed to show error in the summary dismissal of his claim of ineffective assistance of trial counsel in relation to his guilty plea?

3. Has Moen failed to show error in the summary dismissal of his claims of ineffective assistance of counsel in relation to sentencing and relinquishment of jurisdiction proceedings?

4. Has Moen failed to show error in the summary dismissal of his claim that the district court violated the plea agreement?

5. Has Moen failed to show error in the summary dismissal of his claim that the district court was not an impartial tribunal?

6. Is Moen's claim that the district court erred by not overruling precedent of the Supreme Court of the United States frivolous?

7. Has Moen failed to show that the district court abused its discretion by not appointing new counsel after Moen's post-conviction counsel withdrew from the case?

8. Has Moen failed to show he was provided inadequate notice?

ARGUMENT

I.
Moen's Claims That The District Court Violated His Due Process Right To Present Psychological Evidence At Sentencing Is Frivolous

A. Introduction

Moen alleged the district court violated his rights by proceeding to sentencing without a "proper" psychological evaluation. (R., p. 23.) He asserts on appeal that this allegation established a *prima facie* claim that the district court violated his due process rights at sentencing and in relinquishing jurisdiction by not ordering a psychological evaluation under I.C. § 19-2522, and therefore erred in summarily dismissing this claim. (Appellant's brief, pp. 31-42.) Moen's argument is frivolous because due process only requires the *opportunity* to present evidence, and therefore did not require the trial court to *order* Moen to obtain a psychological evaluation.

B. Standard Of Review

On appeal from summary dismissal of a post-conviction petition, the appellate court reviews the record to determine if a genuine issue of material fact exists that, if resolved in the applicant's favor, would entitle the applicant to the requested relief. Matthews v. State, 122 Idaho 801, 807, 839 P.2d 1215, 1221 (1992); Aeschliman v. State, 132 Idaho 397, 403, 973 P.2d 749, 755 (Ct. App. 1999). Appellate courts freely review whether a genuine issue of material fact exists. Edwards v. Conchemco, Inc., 111 Idaho 851, 852, 727 P.2d 1279, 1280 (Ct. App. 1986).

C. Moen's Claim Of A Due Process Violation Is Frivolous Because Due Process Requires Only The Opportunity To Present Evidence

"The right to procedural due process guaranteed under both the Idaho and United States Constitutions requires that a person involved in the judicial process be given meaningful notice and a meaningful opportunity to be heard." State v. Blair, 149 Idaho 720, 722, 239 P.3d 825, 827 (Ct. App. 2010). Due process is afforded if the person whose liberty or property interest is at stake is afforded "meaningful notice and opportunity to present evidence that is relevant" to the proceeding. Id. Three safeguards are required to assure due process in sentencing: (1) an *opportunity* to present favorable evidence; (2) an *opportunity* to examine all materials "contained in the presentence report"; and (3) an *opportunity* to explain or rebut adverse evidence. State v. Gain, 140 Idaho 170, 174-75, 90 P.3d 920, 924-25 (Ct. App. 2004). In the criminal case Moen was given the *opportunity* to examine and respond to the psychological evidence presented at sentencing and to provide additional psychological evidence. Moen, 2010 Unpublished Opinion No. 670, at pp. 2-3. (See also #35907 9/11/08 Tr., p. 47, L. 5 – p. 48, L. 15 (court asking if there are more evaluations needed)).

The district court very clearly did not deny Moen a meaningful opportunity to present favorable evidence. Moen's argument that the district court had to order Moen to secure favorable evidence, in the form of a psychological evaluation, in order to give him a meaningful opportunity to be heard (Appellant's

brief, pp. 31-42[1]) is frivolous. Moen has failed to show error in the summary dismissal of his claim that the district court violated his due process rights.

II.
The District Court Properly Dismissed Moen's Claim Of Ineffective Assistance Of Counsel In Relation To The Guilty Plea

A. Introduction

As part of a plea agreement that resolved three felony cases, Moen pled guilty to a charge of battery, reduced from domestic battery, and received a sentence of credit for time served. (#35907 9/11/08 Tr., p. 4, L. 10 – p. 19, L. 21; p. 24, L. 2 – p. 25, L. 6; p. 81, Ls. 7-10; #35907 R., pp. 40-41.) In post-conviction Moen asserted his trial counsel coerced his guilty plea to a reduced charge of battery despite his claims of innocence. (R., p. 26.) The district court provided notice that it intended to dismiss the petition for lack of supporting evidence (Augmentation, pp. 127-28) and dismissed the petition (R., p. 181). Moen asserts the district court erred (Appellant's brief, pp. 43-46), but fails to cite any evidence in the record supporting a claim of ineffective assistance of counsel.

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[1] Moen asserts that I.C. § 19-2522 "implement[s]" due process safeguards, and therefore failure to *sua sponte* order an evaluation violated due process. (Appellant's brief, p. 31.) The Idaho Supreme Court has rejected this argument. State v. Clinton, 155 Idaho 271, 311 P.3d 283, 285 (2013) (claimed violation of I.C. § 19-2522 not reviewable as fundamental error because "failure to sua sponte order the evaluation did not violate a constitutional right"). Moen also asserts the district court violated due process by not ordering a psychological evaluation prior to relinquishing jurisdiction. (Appellant's brief, pp. 39-42.) Again, this argument is directly contrary to Idaho Supreme Court precedent. State v. Coassolo, 136 Idaho 138, 143, 30 P.3d 293, 298 (2001) (due process does not apply to relinquishment of jurisdiction as no liberty interest is at stake). Neither of these controlling precedents is cited in the Appellant's brief.

B. Standard Of Review

The appellate court exercises free review over the district court's application of the Uniform Post Conviction Procedure Act. Evensiosky v. State, 136 Idaho 189, 190, 30 P.3d 967, 968 (2001). On appeal from summary dismissal of a post-conviction petition, the appellate court reviews the record to determine if a genuine issue of material fact exists, which, if resolved in the applicant's favor, would entitle the applicant to the requested relief. Matthews v. State, 122 Idaho 801, 807, 839 P.2d 1215, 1221 (1992); Aeschliman v. State, 132 Idaho 397, 403, 973 P.2d 749, 755 (Ct. App. 1999). Appellate courts freely review whether a genuine issue of material fact exists. Edwards v. Conchemco, Inc., 111 Idaho 851, 852, 727 P.2d 1279, 1280 (Ct. App. 1986).

C. Moen Presented No Evidence Supporting His Claim Of Ineffective Assistance Of Counsel

A petitioner seeking relief on a claim of ineffective assistance of counsel must prove "that his counsel was deficient in his performance and that this deficiency resulted in prejudice." Murray v. State, 121 Idaho 918, 922, 828 P.2d 1323, 1327 (Ct. App. 1992) (citing State v. Bingham, 116 Idaho 415, 776 P.2d 424 (1989)). To establish deficient performance the petitioner must overcome a strong presumption that counsel performed within the wide range of professional assistance by proving trial counsel's actions fell below an objective standard of reasonableness. State v. Shackelford, 150 Idaho 355, 382, 247 P.3d 582, 609 (2010); Gibson v. State, 110 Idaho 631, 634, 718 P.2d 283, 286 (1986); Davis v. State, 116 Idaho 401, 406, 775 P.2d 1243, 1248 (Ct. App. 1989). To meet this

burden "requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland v. Washington, 466 U.S. 668, 687 (1984). To establish prejudice, a defendant must prove a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different. Aragon v. State, 114 Idaho 758, 761, 760 P.2d 1174, 1177 (1988); Cowger v. State, 132 Idaho 681, 685, 978 P.2d 241, 244 (Ct. App. 1999).

When the alleged deficiency involves counsel's advice in relation to a guilty plea, "[i]n order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill v. Lockhart, 474 U.S. 52, 58 (1985) (footnote and citations omitted). "Moreover, to obtain relief on this type of claim, a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances." Padilla v. Kentucky, 559 U.S. 356, 372 (2010) (citing Roe v. Flores-Ortega, 528 U.S. 470 (2000)).

Trial counsel negotiated a plea agreement regarding three felony charges whereby Moen pled guilty to one felony (DUI), the state dismissed a second felony (intimidating a witness), and the third (domestic battery) was reduced to a misdemeanor so that no additional time would have to be served. There is no evidence in the record supporting a claim that counsel in any way performed deficiently and, far from alleging he would have rejected the plea agreement and gone to trial, Moen's only requested remedy was a reduction in his felony DUI

sentence. On appeal Moen asserts his guilty plea was involuntary, but fails to cite any evidence that any alleged defects in the plea agreement were the fault of counsel and does not even address the relevant prejudice question of whether Moen would have reasonably rejected the plea agreement and demanded a trial on the three felonies. (Appellant's brief, pp. 42-46.) Because Moen failed to present any evidence of deficient performance and did not even allege prejudice, dismissal was proper.

III.
Moen Has Failed To Show Error In The Dismissal Of Claims Of Ineffective Assistance Of Counsel At Sentencing And Relinquishment Of Jurisdiction Proceedings

A. Introduction

Moen asserted that his trial counsel was ineffective for failing to secure a psychological evaluation for both the sentencing and the hearing on relinquishment of jurisdiction. (R., pp. 54-59.) On appeal he asserts that it is enough for him to have demonstrated the possibility of a mental illness to get a hearing on his claim of ineffective assistance of counsel in not securing an evaluation. (Appellant's brief, pp. 46-52.) That Moen may have had a mental illness is not, standing alone, evidence that his counsel was deficient for not obtaining or presenting a psychological evaluation, much less evidence of prejudice. The district court therefore properly dismissed this claim as unsupported by evidence sufficient to raise a *prima facie* claim of ineffective assistance of counsel.

B. Standard Of Review

On appeal from summary dismissal of a post-conviction petition, the appellate court reviews the record to determine if a genuine issue of material fact exists, which, if resolved in the applicant's favor, would entitle the applicant to the requested relief. Matthews v. State, 122 Idaho 801, 807, 839 P.2d 1215, 1221 (1992); Aeschliman v. State, 132 Idaho 397, 403, 973 P.2d 749, 755 (Ct. App. 1999).

C. Moen Failed To Present Evidence Tending To Show Ineffective Assistance Of Counsel In Sentencing Or The Jurisdictional Review

To show ineffective assistance of counsel a petitioner must demonstrate both that counsel's performance was deficient and that such deficiency prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687 (1984). Strategic choices of counsel are reviewed deferentially, and if "made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." Id. at 690. "The duty to investigate requires only that counsel conduct a reasonable investigation." Steven v. State, ___ Idaho ___, ___ P.3d ___, 2013 WL 6423426 (Ct. App. 2013) (citing Mitchell v. State, 132 Idaho 274, 280, 971 P.2d 727, 733 (1998)). Decisions to follow a particular trial or sentencing strategy that make "particular investigations unnecessary" are entitled to "a heavy measure of deference." Cullen v. Pinholster, ___ U.S. ___, 131 S.Ct. 1388 (2011) (citing Strickland). That an attorney could have presented "more evidence" or even "more persuasive evidence" "does not mean" counsel has been ineffective. State v. Payne, 146 Idaho 548, 578, 199 P.3d 123, 153 (2008).

In the criminal case trial counsel elected to pursue a strategy based more on evaluations related to alcohol abuse and rehabilitation than on mental health issues. (See #35907 9/11/08 Tr., p. 47, L. 5 – p. 48, L. 15 (counsel stating intent to proceed to sentencing with substance abuse evaluation and not mental health evaluation).) Such was a reasonable strategy in a DUI sentencing. That strategy is reinforced by evidence suggesting that Moen suffered from untreatable adjustment or personality disorders rather than treatable mental illnesses. (R., pp. 86-89.) Moen presented no evidence that the tactical decision to pursue a sentencing strategy of addressing his addictions rather than his personality disorders was unreasonable or that he suffered any prejudice.

Moen did submit two pieces of evidence he believed supported his claim. First, Moen provided a document purporting to be a letter indicating his girlfriend, on February 4, 2009, made an appointment for a psychological evaluation on March 2, 2009. (R., p. 15.) Because these events were after sentencing, this evidence is not relevant to any claim of ineffective assistance of counsel at sentencing. Nor does the evidence support a claim of ineffective assistance of counsel in relation to the jurisdictional review hearing[2] because, at best, the timing of events indicates any failure to obtain an evaluation was not the fault of counsel.

The first jurisdictional review hearing was scheduled for January 9, 2009, and set over until January 14, 2009. (#35907 R., pp. 62-63.) The court

[2] Moen has failed to establish that the Sixth Amendment right to counsel even applies at a jurisdictional review hearing. The state will assume, for purposes of this brief, that there is a statutory right imposing similar standards of competence.

continued the hearing a second time, until January 26, 2009. (#35907 R., pp. 69-73.) The hearing was then again continued until February 18, 2009. (#35907 R., pp. 74-75.) The hearing was eventually held on February 23, 2009. (#35907 Supp. Tr.) The letter thus indicates that Moen waited until February 4, 2009—after the hearing had been continued three times—to make an appointment for an evaluation. The appointment for the evaluation was, in turn, scheduled for a date weeks after the date for the hearing. This is not evidence that *counsel* performed deficiently in scheduling an evaluation.

The other evidence Moen submitted is a single page of a purported 2009 psychological evaluation. (R., pp. 56-57, 111.) Moen did not provide the remainder of the evaluation, including evidence of whether the evaluation preceded or followed the hearing on retained jurisdiction. The single page of the evaluation he produced contained diagnoses of "numerous psychiatric issues that were quite severe in nature, and could lead to an increased risk to reoffend." (R., p. 111.) Moen's "mood and personality disorders" made him "very impulsive and aggressive" and created the "possibility of intense violence." (R., p. 111.) Neither deficient performance nor prejudice is suggested by this evidence. Overall, the evidence indicates that counsel would not have done Moen any favors by making sure this evaluation was before the sentencing court.

Moen has failed to show any deficient performance in counsel's tactical election to focus on alcohol abuse instead of mental illness for purposes of sentencing. Moreover, his evidence has affirmatively shown a lack of prejudice by demonstrating that a psychological evaluation would have been far more

damning than helpful in sentencing. Moen failed to present admissible evidence demonstrating a *prima facie* claim of either prong of his ineffective assistance of counsel claim.

IV.
Moen's Assertion That The District Court Violated The Plea Agreement Is Frivolous

A. Introduction

Moen alleged the trial court committed "judicial misconduct" by failing to make an "appropriate recommendation" to the Department of Correction and adding to the terms of the plea agreement when it recommended "level A" therapy during the retained jurisdiction program. (R., p. 8, 23-34.) On appeal Moen asserts this constituted a viable post-conviction claim of a due process violation by the district court. (Appellant's brief, pp. 52-55.) Review of the relevant law shows this assertion to be frivolous.

B. Standard Of Review

On appeal from summary dismissal of a post-conviction petition, the appellate court reviews the record to determine if a genuine issue of material fact exists, which, if resolved in the applicant's favor, would entitle the applicant to the requested relief. Matthews v. State, 122 Idaho 801, 807, 839 P.2d 1215, 1221 (1992); Aeschliman v. State, 132 Idaho 397, 403, 973 P.2d 749, 755 (Ct. App. 1999).

C. Moen's Claim That The District Court Violated His Due Process Rights By Recommending A Programming Level Is Frivolous

Moen argues that the district court's recommendation to the Department of Correction that Moen complete level A programming on his rider violated his due process rights in two ways: by rendering his guilty plea involuntary and by imposing an impossible condition of probation. (Appellant's brief, pp. 52-55.) This argument is directly contrary to well established and basic principles of due process law, and is therefore frivolous.

Moen's contention that the district court's actions at sentencing rendered the plea invalid was "repudiated" by the Supreme Court of the United States in 2009. McAmis v. State, ___ Idaho ___, 317 P.3d 49, 50-51 (Ct. App. 2013) (citing Puckett v. United States, 556 U.S. 129, 137 (2009)). Taking Moen's guilty plea certainly did not breach any plea agreement, and no part of the sentence is in any way inconsistent with the terms of the agreement. Even if there were evidence the trial court had taken some action inconsistent with the plea agreement at sentencing, Moen's claim that such rendered invalid his previously entered plea is without legal merit.

Moen's claim that the district court violated his due process rights by imposing a term of probation that was impossible to fulfill when it recommended level A programming during the retained jurisdiction program is equally frivolous. First, Moen was *not put on probation.* Although due process applies before the liberty interest held by a probationer may be taken by the government, State v. Scraggins, 153 Idaho 867, 871, 292 P.3d 258, 262 (2012), an inmate on retained jurisdiction has no "constitutionally protected liberty interest" in the hope of a

future probation, and therefore no right to additional process, State v. Coassolo, 136 Idaho 138, 142-43, 30 P.3d 293, 297-98 (2001).[3] Moen's assertion that due process forbad the trial court's recommendation for programming in relation to his retained jurisdiction is devoid of legal or factual support, and is therefore frivolous.

V.
Moen Has Failed To Show Error In The Summary Dismissal Of His Claim The Court Was Not An Impartial Tribunal

A. Introduction

Moen alleged that in the criminal proceedings the court engaged in "judicial misconduct" such as going "outside the bounds" of the plea agreement, recommending "Level A" on his rider even though Moen was incapable of succeeding at that level, coercing his guilty plea, and "mishandling" letters between him and his attorney. (R., pp. 8, 24.) Moen later moved to amend his petition to allege the trial judge had "contacted the Department of Corrections [sic]" and "sabotaged Petitioner's program." (Augmentation, pp. 43, 76.) He also sought to include allegations that the number of appeals of rulings by the district judge was evidence of his corruption, but that the district judge is affirmed

[3] Although Moen has cited cases for the proposition that a condition of probation impossible of fulfillment is improper because it does not serve rehabilitation, he has cited no cases indicating such a rule is of constitutional origin. (Appellant's brief, p. 54.) Because the primary purpose of retained jurisdiction is to determine the defendant's suitability for probation, learning that a defendant cannot qualify for or complete necessary programming during the retained jurisdiction period is a good way to avoid impossible conditions of probation later.

because the Idaho Court of Appeals is "just as corrupt because they are cronys [sic]." (Id.) The district court denied Moen's attempts to amend his petition. (Augmentation, p. 100.) The district court ultimately concluded Moen's claims in his petition were "unsubstantiated conclusory allegations" and he had failed to present "evidence sufficient to support any grounds upon which relief can be granted." (Augmentation, p. 128.)

On appeal Moen asserts he stated a viable claim that the judge in his criminal case was biased and therefore violated his right to a fair tribunal. (Appellant's brief, pp. 55-57.) Specifically, Moen asserts on appeal that the "district court communicated with the counselor outside Mr. Moen's presence, failed to address the attorney letters in the court file, failed to protect Mr. Moen's health by ensuring adequate mental health treatment and otherwise failed to act impartially." (Appellant's brief, p. 57.) Even a cursory review of this argument shows it is frivolous.

B. Standard Of Review

On appeal from summary dismissal of a post-conviction petition, the appellate court reviews the record to determine if a genuine issue of material fact exists, which, if resolved in the applicant's favor, would entitle the applicant to the requested relief. Matthews v. State, 122 Idaho 801, 807, 839 P.2d 1215, 1221 (1992); Aeschliman v. State, 132 Idaho 397, 403, 973 P.2d 749, 755 (Ct. App. 1999). Appellate courts freely review whether a genuine issue of material fact exists. Edwards v. Conchemco, Inc., 111 Idaho 851, 852, 727 P.2d 1279, 1280 (Ct. App. 1986).

C. Moen's Appellate Arguments That He Presented Evidence Of A *Prima Facie* Claim That The Court Was Biased And Thus An Unfair Tribunal Are Specious

"It is axiomatic that a fair trial in a fair tribunal is a basic requirement of due process." State v. Shackelford, 155 Idaho 454, ___, 314 P.3d 136, 140 (2013) (internal quotations and citations omitted). There are three circumstances indicating bias that are impermissible under the Due Process Clause: "(1) instances where the judge has a financial interest in the outcome of the case; (2) the situation where a judge charges a defendant with criminal contempt and then proceeds to try him on the charge; and (3) cases where a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case." Id. at ___, 314 P.3d at 141 (internal citations omitted). A judge need not disqualify himself if he "can make the proper legal analysis" and the appellate court "presume[s] that a sentencing judge is able to ascertain the relevancy and reliability of a broad range of information which may be presented during the sentencing process, and to disregard that which is irrelevant and unreliable." Id. (internal quotations and citations omitted). "Furthermore, a trial judge's exposure to evidence, admissible or not, standing alone, does not demonstrate bias at sentencing." Id.

During the hearing on retained jurisdiction Moen claimed that his counselor had told him that she had talked with the judge and told him "the judge had nothing good to say about [Moen]." (#35907 Supp. Tr., p. 56, L. 3 – p. 57, L. 16.) The counselor confirmed having a phone conversation with the judge. (Id. at p. 83, L. 9 – p. 84, L. 10.) She testified that the judge informed her that Moen

would not be relinquished merely because the Department of Correction had not placed him in level A programming. (Id. at p. 85, L. 22 – p. 89, L. 15.) The court made explicit findings of fact regarding that conversation, including that he made the call in response to a letter from Moen's counsel to the IDOC counselor, which was copied to the court, and that he took an accurate note of the conversation and provided this note to both counsel prior to the relinquishment hearing. (Id. at p. 115, L. 19 – p. 116, L. 6; Augmentation, p. 298.) Although a call directly to the counselor by the judge was not the best practice, the record shows the judge was merely trying to clarify his order once questions about the significance of his recommendation for placement in level A programming had been raised by Moen. The judge was trying to give Moen the best chance of succeeding on the rider; Moen's claims the judge was casting aspersions or deliberately undermining his chances of success are both devoid of admissible evidence and affirmatively disproved by the record. Likewise, Moen's appellate claim that the counselor conveyed information that influenced the judge at the relinquishment hearing (Appellant's brief, pp. 56-57) was never pled below, lacks support by any admissible evidence, and is disproved by the record. Clearly Moen had a full and fair opportunity to explore the telephone conversation at the relinquishment hearing, in fact did so, and facts disproving his current claim were established in the record.

Moen next claims the court "failed to address the attorney letters in the court file." (Appellant's brief, p. 57.) This claim is directly contrary to the record. At the relinquishment hearing the matter was raised and fully addressed.

(#35907 Supp. Tr., p. 109, L. 11 – p. 113, L. 3.) The court informed Moen it had not read the letters and offered to return them unread. (Id. at p. 112, L. 10 – p. 113, L. 3.) Moen's arguments—that "the existence of privileged communications in the court file certainly raises the appearance of impropriety"; that the court failed to reprimand the jail; and that the court was obviously unprepared for the hearing *because it had not read the letters* (Appellant's brief p. 57 (including note 6))—are wholly irrelevant to any claim the court was biased. There is no evidence the judge sought out or personally obtained the letters (the evidence is exactly to the contrary) so there is no evidence that the judge was involved in any impropriety that might have existed. Likewise, what actions the court did or did not take to address any alleged violation of the attorney client privilege by third parties has no relevance to a claim he was biased against Moen. Again, Moen's appellate assertions are frivolous.

Finally, Moen asserts the court failed to "ensur[e]" he had "adequate mental health treatment." (Appellant's brief, p. 57.) The judge did not decide what mental health treatment Moen received while incarcerated, the Department of Correction did. This claim is specious.

To show that the court was not acting as the constitutional tribunal required by due process is a high bar. Moen's claims did not get close enough to that bar to even go under it.

VI.
Moen's Claim He Is Entitled To An Evidentiary Hearing On Whether He Was Entitled To A Grand Jury Indictment Is Frivolous

Moen argues the court erred by not letting him pursue to an evidentiary hearing his claim that he was entitled to by an indictment returned by a grand jury (as opposed to an information filed after a preliminary hearing). (Appellant's brief, pp. 58-60.) Moen did not have a federal constitutional right to a grand jury indictment in a state court criminal proceeding. Hurtado v. California, 110 U.S. 516 (1884). Moen has failed to show the district court erred by failing to overrule the Supreme Court of the United States.[4] Moen's appellate argument is frivolous.

VII.
Moen Has Failed To Show That The District Court Erred By Granting Post-Conviction Counsel's Motion To Withdraw

A. Introduction

The district court appointed counsel to represent Moen in this post-conviction action. (Augmentation, pp. 2, 5, 16-17.) Moen moved to appoint himself co-counsel because counsel was "unwilling to file motions at [his] request." (Augmentation, pp. 33-35.) He filed a "Motion for Intervention

[4] The general rule is that decisions announcing new rules are to be applied "to all criminal cases still pending on direct review" and are applied retroactively (to collateral attacks on final judgments) only in limited circumstances. Rhoades v. State, 149 Idaho 130, 233 P.3d 61 (2010). See also Whorton v. Bockting, 549 U.S. 406, 416 (2007) ("new rule" applies to cases on direct review but generally not retroactively to collateral attacks on final judgments). Thus, even if the Supreme Court of the United States chooses to overrule Hurtado at some point Moen would not be able to use such overruling to collaterally attack his conviction in this post-conviction action.

Between Attorney/Client" asserting his counsel was "do[ing] absolutely nothing in this case," "tried to discourage [him] from presenting key issues," "refus[ed] to file motions," "has sided with the prosecution and is sabotaging this case," and that refusing to remove his current counsel would be "an act of communism and treason." (Augmentation, pp. 49-51.) A few months later substitute counsel appeared for Moen. (Augmentation, pp. 114-15.) Substiutute counsel later moved to withdraw for lack of cooperation of his client. (Augmentation, pp. 116-17; Tr., p. 6, L. 25 – p. 11, L. 24.) The district court granted counsel's motion to withdraw, and determined that new counsel should not be appointed because the allegations in the supplemental petition were "unsupported by any evidence" and that the facts alleged did not "raise the possibility of a valid claim." (Tr., p. 14, L. 4 – p. 15, L. 4; Augmentation, p. 130.) Shortly thereafter the district court dismissed the petition. (R., p. 181.)

Moen claims the district court violated his due process rights by not appointing new counsel to represent him when his appointed counsel withdrew. (Appellant's brief, pp. 60-76.) Because Moen had failed to raise the possibility of a valid claim, however, he has failed to show any error in the district court's exercise of discretion in declining to appoint counsel.

B. Standard Of Review

Denial of counsel in a post-conviction proceeding is reviewed for an abuse of discretion. Charboneau v. State, 140 Idaho 789, 792, 102 P.3d 1108, 1111 (2004). "In reviewing the denial of a motion for appointment of counsel in post conviction proceedings, '[t]his Court will not set aside the trial court's findings of

fact unless they are clearly erroneous. As to questions of law, this Court exercises free review.'" Charboneau, 140 Idaho at 792, 102 P.3d at 1111 (quoting Brown v. State, 135 Idaho 676, 678, 23 P.3d 138, 140 (2001)).

C. The District Court Did Not Abuse Its Discretion By Concluding That Appointment Of New Counsel Was Not Called For Because Even With The Assistance Of Counsel Moen Had Failed To Allege Non-Frivolous Claims

Post-conviction counsel should be appointed if the petitioner qualifies financially and "alleges facts showing the possibility of a valid claim such that a reasonable person with adequate means would be willing to retain counsel to conduct a further investigation into the claim." Swader v. State, 143 Idaho 651, 655, 152 P.3d 12, 16 (2007); see also Charboneau v. State, 140 Idaho 789, 793, 102 P.3d 1108, 1112 (2004). "Facts sufficient to state a claim may not be alleged because they do not exist or because the pro se applicant does not know the essential elements of a claim." Gonzalez v. State, 151 Idaho 168, 172, 254 P.3d 69, 73 (Ct. App. 2011) (citing Charboneau, 140 Idaho at 793, 102 P.3d at 1112). Review of the record supports the district court's conclusion that there was no factual basis for Moen's claims.

First, Moen had the benefit of two different attorneys for over 18 months. (Augmentation pp. 2 (April 29, 2011 appointment of counsel), 114-15 (substitution of counsel), 130 (November 16, 2012 order permitting withdrawal of counsel).) Counsel filed a supplemental petition on Moen's behalf. (R., pp. 118-78.) Moen cannot claim that any lack of factual development of his pleadings was because of lack of counsel. Moen's inability to formulate a viable claim of

post-conviction relief even with the assistance of counsel demonstrates that the district court properly exercised its discretion because there is no reason to believe that any deficiencies in the pleadings were because of Moen's ignorance, as opposed to lack of merit.

Second, as articulated above, Moen's claims for relief range from meritless to frivolous. Moen asserts other "claims" are possibly valid (Appellant's brief, pp. 69-76 (asserting ineffective assistance of appellate counsel; prosecutorial misconduct; ineffective assistance of counsel for failing to move to suppress; that the DUI statute is unconstitutional or invalid; his DUI was not a felony; disparate sentencing and cruel and unusual punishment; and an argument that multiple frivolous claims may be aggregated to show the possibility of a valid claim), but cites to nowhere in the record that these "claims" were raised in pleadings, much less demonstrates that they were presented in verified form with supporting evidence.[5] On its face Moen's argument that the court should have appointed counsel to pursue claims that prior counsel did not elect to pursue and were never raised in actual pleadings or supported by any evidence or law is frivolous.

Finally, Moen asserts that he is entitled to such procedures as a contested hearing on whether he is entitled to counsel and requiring the district court to

[5] As set forth in more detail below, it would have been error for the district court to address these claims, which were not raised as causes of action in actual pleadings, in summary dismissal proceedings. See Kelly v. State, 149 Idaho 517, 523-24, 236 P.3d 1277, 1283-84 (2010). Moen's belief that new counsel would have successfully amended the pleading to include these claims is unjustified on the record.

address his concerns about previous counsel. (Appellant's brief, pp. 62-68.) A petitioner's right to counsel in post-conviction proceedings is set by statute. See Hall v. State, 155 Idaho 610, ___, 315 P.3d 798, 804 (2013). The Applicable statute, I.C. § 19-4904, does not grant these rights claimed by Moen. The applicable standard, set forth in more detail above, is whether the district court correctly determined that Moen had failed to set forth the possibility of a valid claim. Because there is no reason to believe that any of the claims asserted by Moen are valid or could be rendered valid by *additional* assistance of counsel, the district court did not err by denying appointment of new counsel after appointed counsel withdrew.

VIII.
Moen Had More Than Adequate Notice Prior To Dismissal Of His Petition

A. Introduction

Moen asserts he had inadequate notice because the state's motion to dismiss and the district court's notice of intent to dismiss failed to address "the claims Mr. Moen raised pro se." (Appellant's brief, p. 78.) Specifically, Moen claims the court was required to "address the later submissions ... which were filed after the district court deprived [sic] Mr. Moen of counsel." (Id.) The record shows the district court provided its notice of intent to dismiss at the same time it denied appointment of new counsel. (Augmentation, pp. 126, 130.) Moen's argument that the court was supposed to anticipate his response to the notice of intent to dismiss and preemptively address that response is frivolous.

B. Moen Has Failed To Show That He Was Denied Notice

Although a post-conviction petitioner may not challenge the adequacy of notice for the first time on appeal, he may challenge the absence of notice. Kelly v. State, 149 Idaho 517, 521-22, 236 P.3d 1277, 1281-82 (2010). Where the motion seeks summary dismissal of all claims for lack of evidentiary support and there was no request for clarification, the motion or notice of intent to dismiss cannot be challenged on appeal "irrespective of whether that notice was sufficient." Id. at 522-23, 236 P.3d at 1282-83.

The state moved for dismissal of all claims on the basis that they were supported only by "conclusory allegations unsupported by factual evidence." (Augmentation, pp. 112-13.) The district court addressed the claims in the petition and supplemental petition in more detail, finding both factual and legal deficiencies in the claims. (Augmentation, pp. 126-29.) Moen was provided notice that the claims he had asserted in his pleadings were subject to summary dismissal because they were unsupported by admissible evidence, were legally deficient, or both, and therefore there is no error shown on appeal with the dismissal of the petition and supplemental petition.

C. The Court Did Not Have To Provide Notice Of Intent To Dismiss Causes Of Action Never Raised In The Pleadings

Moen also contends he raised several causes of action in his "pro se submissions" that were unaddressed in the state's motion and court's notice. (Appellant's brief, pp. 76-78.) Moen cites no law that causes of action raised outside of a petition must be addressed in a motion to dismiss that petition. (Id.)

The law is to the contrary: "It is clearly established under Idaho law that a cause of action not raised in the party's pleadings may not be considered on summary judgment nor may it be considered for the first time on appeal." Kelly, 149 Idaho at 523-24, 236 P.3d at 1283-84. Thus, under "clearly established Idaho law" completely ignored by Moen, not only was it not error for the court to not consider Moen's attempts to raise new claims, *it would have been error for it to do so.* Id. Moen, far from showing error, is actively encouraging it. His appellate claim of lack of notice prior to dismissal of causes of action asserted outside the pleadings must be rejected.

CONCLUSION

The state respectfully requests this Court to affirm the summary dismissal of Moen's petition for post-conviction relief.

DATED this 25th day of February, 2014.

KENNETH K. JORGENSEN
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 25th day of February, 2014, I caused two true and correct copies of the foregoing BRIEF OF RESPONDENT to be placed in the United States mail, postage prepaid, addressed to:

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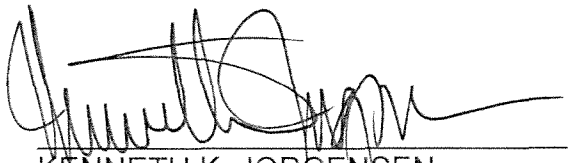

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KKJ/pm